Supreme Court, U. S.
FILED
OCT 3 1980
MICHAEL RODAK, JR., CLERK

No. 80-538

In the Supreme Court of the United States

OCTOBER TERM, 1980

PAUL CIAMPAGLIA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ALFRED PAUL FARESE
MICHAEL F. NATOLA
366 Broadway
Everett, MA 02149
(617) 387-6380
Attorneys for Petitioner

Blanchard Press, Inc., Boston, Mass. — Law Printers

I

QUESTIONS PRESENTED

A. Whether the government's chief witness' courtroom entry and exit under guard of United States' Marshals, his testimony on direct examination that he was in the witness protection program, and the stationing of his guard at the front of the courtroom for his three days of testimony impermissibly eroded the petitioner's presumption of innocence and denied him his right to a fair trial.

B. Whether the trial judge's instructions to the jury improperly placed the burden of proof on the issues of intent and knowledge upon the petitioner rather than upon the government.

PARTIES

This petition for a writ of certiorari relates to the appeal of petitioner Paul Ciampaglia alone. A notice to the Clerk, pursuant to Rules of the Supreme Court of the United States, Rule 19.6 is being filed concurrently with this petition.

INDEX

	Page
Question Presented	I
Parties	I
Opinion Below	1
Jurisdiction	2
Statement	2
Reasons for Granting the Petition	4
Conclusion	9
Appendix A	A-1
Appendix B	A-20

Table of Citations

CASES:

	Page
Coffin v. *United States*, 394 U.S. 165 (1895)	4
Dorman v. *United States*, 435 F.2d 385 (D.C. Cir. 1970)	5
Estelle v. *Williams*, 425 U.S. 501, *reh. den.* 426 U.S. 954 (1976)	4, 5
Illinois v. *Allen*, 397 U.S. 337 (1970)	5
In re Winship, 397 U.S. 358 (1970)	8
Massey v. *Moore*, 348 U.S. 105 (1954)	4
Mullaney v. *Wilbur*, 421 U.S. 684 (1975)	7
Patterson v. *New York*, 432 U.S. 197 (1977)	7
Sandstrom v. *Montana*, __ U.S. __, 99 S.Ct. 2450 (1979)	7
Taylor v. *Kentucky*, 436 U.S. 478 (1978)	4
United States v. *Feola*, 429 U.S. 671 (1975)	8
United States v. *Samuel*, 431 F.2d 610 (4th Cir.), *cert. den.*, 401 U.S. 946 (1971)	5
Walker v. *Butterworth*, 599 F.2d 1074 (1st Cir. 1979)	5

PREVIOUS PAGE WAS BLANK

STATUTES AND COURT RULES:

	Page
18 U.S.C. §152	2
§371	2
§1341	2
§1342	2
28 U.S.C. §2111	8
Federal Rules of Criminal Procedure, Rule 52(a)	8

In the
Supreme Court of the United States

OCTOBER TERM, 1980

No.

PAUL CIAMPAGLIA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Counsel for Paul Ciampaglia, in his behalf, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

Opinion Below

The opinion of the Court of Appeals (App. A, *infra*, pp. A-1 - A-19) is not yet reported. The district court entered no opinion pertaining to the questions presented in this petition.

Jurisdiction

The judgment of the Court of Appeals (App. B, *infra*, p. A-20) was entered on August 4, 1980. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Statement

1. On January 11, 1979 a grand jury returned indictments charging the petitioner and seven other defendants with conspiracy to commit mail fraud, 18 U.S.C. §371 (Count 1) and ten instances of mail fraud, 18 U.S.C. §§1341, 1342, (Counts 3-12). Each co-defendant, with the exception of the petitioner, Paul Ciampaglia, was also charged with conspiring to conceal the property of a bankrupt, 18 U.S.C. §152 (Count 2).[1]

Federal jurisdiction in the court of the first instance, the Federal District Court for the District of Massachusetts, was based on violations of federal criminal statutes herein listed.

2. All defendants were tried together on all of these counts. At the close of the evidence, the trial court entered judgments of acquittal on seven of the mail fraud counts against defendants John Ginter and Verner Bancroft. The jury returned guilty verdicts as to all individual defendants on all remaining counts. The corporation, Masterson, was acquitted.

3. The government's chief witness, Leo Power, testified at trial for a period of three days. Power was the government's most important witness who supplied the testimony most damaging to the defendants. Power's testimony was preceded by his dramatic entry on his first day on the stand. He was brought into the courtroom and up to the witness stand flanked by a federal marshal on each side, all in full view of the jury. At least one of the marshals entered the bar enclosure with Power and sat at the front of the courtroom facing the defendants.

4. In addition to the obvious showing that Power was under guard, the prosecutor, early in his direct examination, elicited

---

[1] These co-defendants were: Stanley McNiff, William Woods, Peter Canessa, John Ginter, Verner Bancroft, David Holzinger and Masterson Enterprises, Inc.

from the witness the fact that he was being protected. Power stated: "I was promised that if I testified before the grand jury and in open court, if necessary, that I would have to plead guilty to one offense of receiving fraudulent merchandise and that I would also be given a new Social Security number and subsistence and put on the witness protection program." During the entire three days of Power's testimony the marshal guarding Power remained stationed at the front of the courtroom, and when Power completed his testimony he left the courtroom, again under guard of the marshal, and again in full view of the jury.

5. Counsel for the petitioner objected to these circumstances at trial and argued the present issue on appeal. The Court of Appeals recognized that the disclosure of a witness' participation in a witness protection program was a matter which must be handled delicately. The Court concluded that the "dispositive factor is whether within the context of the entire case there is a reasonable likelihood of substantial prejudice." (App. A, *infra*, at A-12). The court then dismissed the possibility of prejudice as not reasonably likely, offering as alternative explanations the propositions that the jurors would have interpreted the increased security measures as "normal courtroom procedure" or that the jurors would instead have inferred that Power was being guarded by the marshals in order that he not escape. (App. A, *infra*, at A-13).

6. In his instruction to the jury on the issue of proof of intent, knowledge and state of mind—essential elements of the offenses charged—the trial judge charged: "What a man does is frequently more indicative of his true state of mind than what he says." The petitioner's counsel argued that this charge deprived the jury of its factfinding function in determining whether actions or words are more indicative of one's state of mind, and thereby shifted to the petitioner the burden of disproving the state of mind indicated by his actions.

7. The Court of Appeals agreed that the above instruction on intent could possibly have been misread by a juror as mandating such an improper inference. Yet the Court held that, because of the use of the word "may" and other qualifying phrases in other parts of the instructions, such an inference would not reasonably be drawn when the instructions were taken as a whole.

8. The Court of Appeals affirmed the judgment of the District Court. (App. A, *infra*, A-1 - A-19).

Reasons for Granting the Petition

A. In *Estelle* v. *Williams*, 425 U.S. 501, *reh. den.*, 426 U.S. 954 (1976) the Court held that requiring a defendant to appear before a jury in prison garb was an unconstitutional infringement of the fundamental right to a fair trial by an impartial jury. The basis for this decision was that certain factors may impermissibly erode the presumption of innocence which lies at the very foundation of our system of criminal justice. Courts of Appeal are now engaged in the difficult task of determining just what in-court factors and circumstances, often the result of unusual security measures, give rise to such an impermissible, unconstitutional infringement. The instant case provides an appropriate opportunity for the Court to set out clear criteria to resolve this important and recurring issue.

As the court has repeatedly emphasized, the principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary; and its enforcement lies at the foundation of the administration of our criminal law. *Taylor* v. *Kentucky*, 436 U.S. 478 (1978); *Estelle* v. *Williams*, 425 U.S. 501 (1976); *Massey* v. *Moore*, 348 U.S. 105 (1954); *Coffin* v. *United States*, 156 U.S. 432 (1895). To implement the presumption and protect the rights of the accused, courts must "be alert to factors that may undermine the fairness of the factfinding process." *Estelle* v. *Williams*,

supra at 501. Courts have recently held that requiring a defendant to appear in prison garb (*Estelle* v. *Williams*, supra), or to be confimed in a prison dock (*Walker* v. *Butterworth*, 599 F.2d 1074, 1080 (1st Cir. 1979)) is an unconstitutional infringement of the basic right to a fair trial.

Although it appears well settled that the trial judge has the duty to see that the trial is conducted in a safe and decorous manner, *United States* v. *Samuel*, 431 F.2d 610 (4th Cir. 1970), *cert. den.*, 401 U.S. 946 (1971) many courts have indicated that there must be some showing of necessity or little likelihood of prejudice before physical restraints or unusual security measures are taken. See *Illinois* v. *Allen*, 397 U.S. 337 (1970); *Walker* v. *Butterworth*, supra; *United States* v. *Samuel*, supra; *Dorman* v. *United States*, 435 F.2d 385 (D.C. Cir. 1970). In the instant case there was no plausible showing of need for such unusual security measures so as to permit the erosion of the petitioner's presumption of innocence.

The Court of Appeals in the instant case did not in any way address the issue of the necessity of these procedures. They dismissed the petitioner's claim of prejudice by proffering the alternative explanations that the jury would probably have thought the extra security measures to be "normal courtroom procedure", or that the presence of extra guards was intended to guard against the witness Power's escape. (App. A, *infra*, at A-13). The petitioner respectfully contends that both explanations are patently untenable. The dramatic entrances and exits of Power surrounded by armed federal marshals, and the continued presence of said marshals in the front of the courtroom facing the defendant *only* during the testimony of Power can hardly be called normal courtroom procedure. Nor would a reasonable juror, in light of Power's revelation that the government was going to provide him with a new Social Security number, subsistence, and enrollment in the Witness Protection Program in exchange for his testimony, assume that the extra security measures were intended to guard against Power's escape.

It is clear that the only inference a jury could reasonably draw from the unusual security measures, in conjunction with the witness' revelations, was that Power was reasonably fearful of the defendants.

The petitioner respectfully submits that his constitutional right to a presumption of innocence was seriously derogated and that the present case provides a proper occasion to resolve the instant issue and provide guidance for courts presently struggling with similar issues.

B. In his charge to the jury, the trial judge instructed the jury as follows on the issue of proof of intent and state of mind:

> " 'Knowledge' and 'willfulness' are mental conditions or a state of mind. Normally we cannot prove a state of mind for the obvious reasons that no witness is able to look inside a person's mind and find out or testify as to what he saw there. So you must judge a person's intent by what a person does or says or fails to do or fails to say.
>
> What a man does is frequently more indicative of his true state of mind than what he says.
>
> The element of knowledge may be satisfied by inferences drawn deliberately closed his eyes to what otherwise would have been obvious to you. You may infer knowledge if you find beyond a reasonable doubt that the witness refused to be enlightened, refused to take notice.
>
> Stated another way, a defendant's knowledge may be inferred from a willful blindness to the existence of the fact. It is entirely up to you as to whether you find any deliberate closing of the eyes and the inference to be drawn from any such evidence."

Both the trial court and the court of appeals agreed that that part of the instruction which stated that what a man does is frequently more indicative of his true state of mind than what he says was an improper instruction. An attempted curative

instruction by the trial judge only had the unfortunate effect of restating and re-enforcing the original improper instruction. (App. A, *infra*, A-16 at footnote 7).

The petitioner contends that the pertinent portion of these instructions clearly told the jury that a man's actions are frequently more indicative of his state of mind than what he says, thereby shifting to the petitioner the burden of disproving the state of mind indicated by his actions. This contravenes the holding of the Supreme Court that the government must prove every element of a criminal offense beyond a reasonable doubt and may not shift the burden of proof to the defendant of any element of the offense. *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *Patterson* v. *New York*, 432 U.S. 197 (1977). In the instant case "intent" was a critical element of the charged offenses, and the burden of proof of this element was indeed shifted to the petitioner. For, if the petitioner's actions would indicate the requisite intent, even though what the petitioner said would not, the instruction had the effect of telling the jury that it was very likely that his actions despite what he said regarding those actions. Consequently, the burden shifted to the petitioner to explain away his actions in order to disprove the intent manifested by them in the minds of the jury.

Recently, in *Sandstrom* v. *Montana*, __ U.S. __, 99 S.Ct. 2450 (1979), the Supreme Court examined language in a jury instruction which was held to shift the burden of proof on intent to the defendant. The trial judge in *Sandstrom*, a state murder prosecution, instructed the jury that, "(t)he law presumes that a person intends the ordinary consequences of his voluntary acts." *id.* at 2453. The Supreme Court held that because the jury could have concluded that, upon proof by the state of slaying and additional facts not themselves establishing the element of intent, the burden was then shifted to the defendant to prove that he lacked the requisite mental state. Therefore, this instruction violated due process standards as enunciated in *Mullaney* v. *Wilbur*, supra. The instant case is

Because of the fundamental right involved here the petition for a Writ of Certiorari should be granted to resolve this issue.

Conclusion

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ALFRED PAUL FARESE
MICHAEL F. NATOLA
Attorneys for the Petitioner

August, 1980

PREVIOUS PAGE WAS BLANK

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 79-1269

UNITED STATES OF AMERICA,

APPELLEE,

v.

PAUL CIAMPAGLIA,

DEFENDANT, APPELLANT

No. 79-1270

UNITED STATES OF AMERICA,

APPELLEE,

v.

WILLIAM WOODS,

DEFENDANT, APPELLANT

No. 79-1271

UNITED STATES OF AMERICA,

APPELLEE,

v.

PETER CANESSA,

DEFENDANT, APPELLANT

No. 79-1272

UNITED STATES OF AMERICA,

APPELLEE,

v.

JOHN GINTNER,

DEFENDANT, APPELLANT

No. 79-1274

UNITED STATES OF AMERICA,

APPELLEE,

v.

VERNER BANCROFT,

DEFENDANT, APPELLANT

No. 79-1391

UNITED STATES OF AMERICA,

APPELLEE,

v.

STANLEY McNIFF,

DEFENDANT, APPELLANT

No. 80-1218

UNITED STATES OF AMERICA,

APPELLEE,

v.

STANLEY McNIFF,

DEFENDANT, APPELLANT

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. A. DAVID MAZZONE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Michael F. Natola, with whom *Alfred Paul Farese*, was on brief, for appellant Paul Ciampaglia.

Bernard Grossberg, by appointment of the Court, on brief for appellant William Woods, and *William Woods*, on supplementary brief pro se.

David Patterson, by appointment of the Court, for appellant Peter Canessa.

Paul A. Manoff, for appellant John Gintner.

Albert F. Cullen, Jr., by appointment of the Court, for appellant Verner Bancroft.

Richard K. Donahue, with whom *Donahue & Donahue*,

Margot Botsford, *S. Stephen Rosenfeld*, and *Rosenfeld, Botsford & Krokidas*, were on brief, for appellant Stanley McNiff.

George F. Kelly, Assistant United States Attorney, with whom *Edward F. Harrington*, United States Attorney, was on brief, for appellee.

August 4, 1980

Coffin, *Chief Judge*. In January of 1979, after a lengthy investigation, the grand jury returned indictments charging appellants and others with conspiracy to commit mail fraud, 18 U.S.C. § 371, (Count 1) and ten instances of mail fraud, 18 U.S.C. §§ 1341, 1432, (Counts 3-12). Each appellant with the exception of Paul Ciampaglia was also charged with conspiring to conceal the property of a bankrupt, 18 U.S.C. § 152, (Count 2). Appellants were tried together on all of these counts. At the close of the evidence, the trial court entered judgments of acquittal on seven of the mail fraud counts against John Gintner and Verner Bancroft who were not shown to have joined the conspiracy at the time that these seven acts of fraud were perpetrated. On all of the remaining counts, each of the appellants was convicted as charged. These appeals followed and have been consolidated for review.[1]

In January of 1976 Peter Canessa rented space in a building on High Street in Clinton, Massachusetts, from Stanley McNiff. Beginning in late March and continuing through September, a large number of manufacturers, wholesalers and distributors began receiving orders for merchandise from a firm called Masterson Enterprises [Masterson], which listed the High Street building as its address. The orders were usually signed by Canessa. Most of the companies contacted responded by requesting credit information from references supplied by Masterson. At least some of the references were apparently fictitious, and one was a company operated by

---

[1] Also included in our review of this case is appellant McNiff's appeal from a denial of a motion for a new trial brought during the pendency of this appeal.

appellant Ciampaglia. Canessa and other defendants then arranged to send back false "responses" to the requests, providing fictitious favorable credit information concerning Masterson. Many of the companies with which the orders were placed then forwarded merchandise to Masterson. The merchandise, for which Masterson never paid, was initially stored in a number of Clinton locations owned by McNiff. Most of it was later sold, generally to a company operated by Ciampaglia, at prices substantially less than the wholesale cost.

In October of 1976 an involuntary petition for bankruptcy was filed against Masterson. The company was adjudicated bankrupt on October 11 and a receiver was appointed the next day. As a result of a fire at a building owned by McNiff and rented to Masterson, the receiver was notified by fire department officials of the existence in the building of several filing cabinets that contained legible Masterson records. Before the receiver could obtain the records, however, one of the defendants, Bancroft, removed the cabinets, and the records have never been found.

I. Sufficiency of the Evidence

Appellants McNiff, Ciampaglia, Gintner, and Bancroft each contend that the evidence was insufficient to support their convictions. Viewing the evidence in the light most favorable to the government, *United States* v. *Mora*, 598 F.2d 682, 683 (1st Cir. 1979), we reject these contentions. Concerning Gintner, Bancroft, and Ciampaglia, the facts sufficient to support their convictions are set forth in Part VI of this opinion discussing the "willful blindness" instruction.

With regard to McNiff, the pertinent evidence was as follows: (1) He associated with Masterson and its chief operator, Canessa, continually from the commencement of Masterson's operations to the scheme's demise. (2) During this period, he provided for Masterson's use virtually all of the various buildings and trailers used by the conspirators. (3) As payment for providing these locations, he accepted merchan-

dise, the receipt of which, despite the advice of his attorney, he did not record. (4) He claimed that he accepted the merchandise in lieu of normal rent because Masterson was short of cash, yet the evidence showed that he knew Masterson had a substantial amount of cash and generally operated on a "cash only" basis. (5) He failed promptly to disclose to the bankruptcy receiver the existence of a Masterson office trailer which he had received and placed behind a house near his premises. (6) When Masterson records were discovered at a house owned by him, he pretended not to know who owned the building and asked Leo Power "how the hell am I going to get around who rented the house and *what was going on there?*" (emphasis added). (7) He suggested to Canessa that Masterson records, which were never found by the trustee, be moved from the building and he observed Bancroft removing them. (8) He provided a credit reference for Masterson at a local bank. (9) Attempting to conceal his connection to Masterson, he lied to a grand jury, and asked Power to lie also. (10) In a lengthy conversation with Power concerning the grand jury investigation, he indicated knowledge of the conspiracy and a desire to cover it up and to determine who was talking to the investigators.[2]

---

[2] The nature of the conversation which Power tape recorded, is illustrated by the following excerpt:

"LP: But the stuff they're talking about now, Stanley, someone had to feed them all this information, you know what I mean, to come home to roost.

SM: So you think it's much worse than we thought? It looks that way.

LP: Oh, definitely, definitely.

SM: No, Marlene and the other one knew, or Marlene knew anyways, one of those girls was there. Hmmm . . .

LP: What, when the deal was made?

SM: When they were picked up, there was no money exchanged then you know.

LP: Because all I told them, is that I bought one . . . So.

SM: She wouldn't know how I got them but I got them.

Viewing all of this evidence together, we find it sufficient to have allowed the jury to find McNiff guilty beyond a reasonable doubt. In particular facts 3, 4, 6, 9, and 10, *supra*, were adequate to support a finding of knowledge of the conspiracies. Similarly facts 1, 2, 5, and 7 were adequate to support a finding that, knowing of the conspirators' objectives, McNiff actively assisted them in carrying out the two main conspiracies charged in the indictment. Finally, his knowledge

---

LP: Oh, because, this is what I'm trying to figure out because I asked you before and you didn't give me an answer, you said you didn't remember, you know what I mean?

SM: What's that?

LP: When I asked you if you told them because I told them . . .

SM: No, no I didn't.

LP: I told them I got one . . . and sent the guarantee in on it, remember?

LP: And he said, what about the others? Because there was the other ones, remember the one . . .

SM: But I didn't sell you one, huh? There was no money exchanged between you and I.

LP: No, you gave them to me, Stanley.

SM: Huh, whatever, you picked it up, or someone, I didn't know.

SM: He said they wanted to know where he got it, and he said they asked him if he got it from the 'Panther,' they said did you take anything from the 'Panther?' And he said, you mean the 'Cheetah,' and he said ya, a couple of things from there, which would had me covered because I returned stuff, I took in rent, you know, like the bedroom set, I told them that. But he didn't know anything about a trailer, there was no mention of the trailer.

SM: But they did mention the trailer? Did they get specific with you on the location of the trailer and everything?

LP: The trailer, he said, we know for a fact that you got, Bostonian shoes from the trailer behind McNiff's (grand) McNiff's father's, you got office supplies from Squannacook Road.

SM: Oh, I'm really fucked now. (unintelligible)

LP: That's what I'm talking about?

SM: Well, it has to be Karen, who the fuck else would know? Sure.

of the aim of the conspiracy together with his own otherwise legitimate business experience supported a reasonable inference that he knew that the mails were to be used in defrauding the various creditors.

II. Timing of the Petrozziello Ruling

In *United States* v. *Petrozziello*, 548 F.2d 20 (1st Cir. 1977), we held that district courts should only admit out of court declarations of co-conspirators under Fed. R. Evid. 801 (d) (2) (E) if "it is more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy." *Id.* at 23. During the trial of this case, the prosecution's use of the out of court statements of various defendants as part of its case in chief against all defendants required the district court to apply the *Petrozziello* standard. On the eleventh day of trial, before the defense presented any evidence, the district court found that the prosecution had met the *Petrozziello* standard. The court thereupon removed the limitations that it had previously placed upon the use of the evidence.

Appellant McNiff now contends that because the district court made its ruling before the defense presented any evidence, it could not have properly applied the *Petrozziello* standard. Appellant reasons that *Petrozziello* requires a "preponderance of the evidence" test, *United States* v. *Martorano*, 557 F.2d 1, 11 (1st Cir. 1977), *reh. denied* 561 F.2d 406 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978); that such a test requires a weighing of all the evidence; and that therefore it is impossible for the district court properly to have applied the test without hearing the defendants' evidence.

Neither in *Petrozziello* itself nor in subsequent cases, *see*, e.g., *United States* v. *Martorano*, *supra*; *United States* v. *Pappas*, 611 F.2d 399 (1st Cir. 1979), did we address the issue of when the required "more likely than not" findings are to be made. While it is not irrational to view *Petrozziello* as

merely mandating an increase in the required probative force of the prosecution's evidence, *cf. United States* v. *Trotter*, 529 F.2d 806, 812 (3d Cir. 1976) (adopting substantive standard "more severe than the prima facie standard"), we think that in adopting the "more likely than not", "preponderance" test we implicitly anticipated that the defendant's evidence would be taken into consideration. At least three circuit courts have explicitly adopted such a rule, *see United States* v. *James*, 590 F.2d 575, 582 (5th Cir.) (en banc), *cert. denied* 442 U.S. 917 (1979); *United States* v. *Bell*, 573 F.2d 1040, 1043 (8th Cir. 1978); *United States* v. *Stanchich*, 550 F.2d 1294, 1298 (2d Cir. 1977), and we find much merit in it. It is not difficult to imagine a case in which the basic question of whether a conspiracy existed could be greatly or even dispositively affected by the defendant's evidence. To find out of court declarations admissible under Rule 801 (d) (2) (E) in such a case after hearing only the prosecution's evidence would render almost meaningless any difference between the standard announced in *Petrozziello* and the prima facie standard that it replaced. Moreover, requiring trial courts to delay *Petrozziello* rulings until the conclusion of all the evidence would not create any significant additional demands or difficulties.

We therefore hold that trial courts should proceed in accordance with the following rule, which we adopt in partially amended form from the Eighth Circuit opinion in *United States* v. *Bell*, *supra* at 1044:

If the prosecution attempts to introduce into evidence an out-of-court declaration under Fed. R. Evid. 801 (d) (2) (E), the trial court, upon proper objection, may conditionally admit the declaration.[3] If the declaration is conditionally admitted, the court should inform the parties on the record

[3] We do not intend to imply that district courts may not in appropriate cases follow alternative procedures pursuant to Fed. R. Evid. 104 in order to determine the admissibility of evidence under Fed. R. Evid. 801 so long as a proper "preponderance" ruling is made.

out of the hearing of the jury that (a) the prosecution will be required to prove by a preponderance of the evidence that a conspiracy existed, that the declarant and defendant were members of it at the time that the declaration was made, and that the declaration was in furtherance of the conspiracy, (b) that at the close of all the evidence the court will make a final *Petrozziello* determination for the record, out of the hearing of the jury; and, (c) that if the determination is against admitting the declaration, the court will give a cautionary instruction to the jury, or, upon an appropriate motion, declare a mistrial if the instruction will not suffice to cure any prejudice.

In the instant case, however, neither appellant nor anyone else objected to the timing of the district court's finding. Appellant failed to make any objection setting forth the reasoning that he now persuades us to adopt. Even in the Eighth Circuit, which held two years ago that district courts should make a final preponderance determination at the end of all the evidence, failure to object at trial to the omission of such a determination bars an appellant from raising the point on appeal in the absence of plain error. *United States* v. *Baykowski*, 615 F.2d 767 (8th Cir. 1980). Our own examination of the record convinces us that there was no plain error in this case.[4]

III. Pre-Indictment Delay

The prosecution introduced into evidence a tape recording of a conversation between McNiff and one Leo Power made by Power while acting as a government informant. The conversation took place one and a half years after McNiff first appeared

[4] We also reject appellant's argument that the district court erred in admitting "wholesale" the myriad statements of the conspirators. The numerous statements were related to each other in a manner that indicates that a finding by the court that any of them were admissible under *Petrozziello* would imply that most if not all were admissible. If appellant felt that any particular statement should have been treated differently with regard to him, he should have specified any statements that he felt deserved separate treatment, or at least objected to the wholesale nature of the ruling.

with his lawyer before the grand jury and almost a year before he was indicted following several additional grand jury appearances. McNiff moved to suppress the tape recording on the grounds that it violated his Sixth Amendment right to the assistance of counsel because his lawyer was not present when it was made. He argued that the government delayed the securing of the indictment for the purpose of forestalling the triggering of his right to counsel until after the investigation was completed.

Appellant's characterization of this argument as raising a Sixth Amendment issue is incorrect. As his argument itself implies, "it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." *Kirby* v. *Illinois*, 406 U.S. 682 (1972). The Sixth Amendment right to the assistance of counsel in "criminal prosecutions", U.S. Const. amend VI, is by definition not implicated by delays in commencing prosecutions. *Kirby* v. *Illinois, supra; United States* v. *Craig*, 573 F.2d 455, 475 (7th Cir. 1977) *cert. denied* 439 U.S. 820 (1978). Properly characterized, appellant's argument is instead a challenge on due process grounds to the legitimacy of prosecutorial delay in securing an indictment.

Addressing this challenge on the merits, we find no violation of appellant's rights. The prosecution has wide discretion in deciding to delay the securing of an indictment in order to gather additional evidence against an individual. That discretion is limited only by the requirement that it not violate those "fundamental conceptions of justice which lie at the base of our civil and political institutions", *United States* v. *Lavasco*, 431 U.S. 783, 790 (1977), *quoting Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935); *see also United States* v. *Ramos Algarin*, 584 F.2d 562, 567 (1st Cir. 1978). Whenever a prosecutor using that discretion decides to delay asking for an indictment, an obvious and foreseeable result is the forestalling of myriad

might have prejudiced the jurors by inducing them to think that Power was fearful of defendants. Counsel also contended that Power's statement was exacerbated by his entry into the courtroom in the company of two Deputy United States Marshals, one of whom sat during Power's testimony by a door in the front of the courtroom through which the jury entered. The district court denied a motion for a mistrial, but offered to give a cautionary instruction to the jury. Counsel declined the offer, stating that they feared that such an instruction would draw too much attention to Power's statement.

While courts have stated that disclosure of a witness's participation in a witness protection program "is a matter that must be handled delicately", *United States* v. *Partin*, 552 F.2d 621, 645 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977), appellants can point to no case in which such a disclosure was held to constitute cause for a mistrial. At least when not exploited by the prosecution, the possibility that such a disclosure might cause undue prejudice to defendants is, we think, generally minimal, as evidenced by the often asserted and protected right of defendants to require disclosure of such deals, *see, e.g., United States* v. *Agurs*, *supra*. This is not to say, however, that within the context of a particular case such a disclosure might not constitute reversible error, especially if the prosecution were to exploit the prejudicial potential of the disclosure by encouraging the jury to draw certain inferences. The dispositive factor is whether within the context of the entire case there is a reasonable likelihood of substantial, unwarranted prejudice.

In the instant case, Power's reference to the "witness protection program" was brief and isolated. No explanation of the meaning of the term or the criteria for participation in it was given to the jurors, who of course were lay persons. We recognize that, nevertheless, the mere use of the word "protection", together with the presence of the two marshals accompanying Power could conceivably have led at least some jurors

PREVIOUS PAGE WAS BLANK

to draw on their own the inference that Power, was with reason, fearful of defendants. This conceivable possibility is not however a reasonably likely one. Marshals were present in the courtroom at various times during the trial other than when Power testified. One of them sat in the bailiff's chair and at times ushered into the courtroom witnesses other than Power. It seems highly unlikely that the jurors both noticed that two marshals, rather than one, ushered in Power and inferred that this in conjunction with the isolated reference to the witness protection program meant that he was in need of protection from the defendants. It seems much more likely that the jurors interpreted the marshals' presence to be normal courtroom procedure, or instead perhaps inferred that Power, who testified with respect to his participation in a large number of crimes, was being guarded by the marshals in order that he not escape.

V. Prosecution's Withholding of Evidence That Might Have Impeached Its Own Witness

Following Leo Power's testimony, counsel for each of the defendants proceeded in turn to attack vigorously his credibility. Collating the various points made, we find that it was shown that Power had committed perjury on several prior occasions, perpetrated mail fraud, broke and entered into buildings owned by defendants in order to steal a number of goods, and in general was a highly disreputable individual. During this litany of attacks on Power, counsel for appellant McNiff also asked Power if he set the fire that burned down one of the Masterson storage buildings. Power said no. Counsel then asked him if he knew that both his ex-wife and McNiff accused him of having done so. Power answered yes.

At the conclusion of the trial, McNiff moved for a new trial, arguing that the prosecution should have objected when Power denied setting the fire, since it had been told by one Donald McHugh that Power admitted setting the fire. The district court denied the motion, pointing to the general im-

materiality of how the fire started, the fact that Power had consistently and repeatedly denied setting the fire when questioned by government agents who, the court found, believed him, the extrinsic nature of McHugh's statement, and the fact that McNiff himself knew of the accusation by McHugh even before the prosecution did.

Defense counsel subsequently discovered that the prosecution also had in its possession notes of a statement made by Karen Power, Power's ex-wife, which she had initialed and in which she described in detail the basis of her claim that Power set the fire. A renewed motion for a new trial was brought and it too was denied. The district court appropriately chided the prosecution for not coming forward with the notes at the hearing on the first motion, but found that the government's questionable behavior was not grounds for a new trial. The court based this finding on essentially the same grounds upon which its first decision was based, and in addition noted that once again defendants already knew from several sources of Karen Power's accusation and successfully established at trial that she had made it.

McNiff now appeals from the denial of his two motions, arguing that the district court selected the improper standard of materiality from among the three standards set forth in *United States* v. *Agurs*, 427 U.S. 97 (1976), that it ignored the fact that the actual initialed notes, compiled well before the trial, would have been especially helpful in proving that Power set the fire, and that it was incorrect in characterizing the fire itself as "collateral". We find that we need not address all of these points, however, because we agree with the district court that the notes were immaterial, and in any event could not possibly have affected the judgment of the jury.

Appellant makes much of the fact that "the fire was a highly critical event linking [him] to the alleged conspiracy." This is true, because the fire focused the attention of the local authorities on the building and led to the discovery of

what the receiver had supposed to be nonexistent records (which later disappeared). Thus, in that the fire ruined the attempts of the conspirators to hide the existence of additional Masterson records from the receiver, it was "highly critical". How the fire started, however, was in no way relevant to the prosecution's case; as the district court noted, no defendant was alleged to have started the fire, and the jury would not on its own have drawn such an inference from the manner in which the government's case was presented.

The only possible relevance of the manner in which the fire started, and hence the notes, was for limited impeachment purposes — the establishment of a prior "bad act" by a witness.[5] It is unlikely though that the notes could have been used at trial to prove that Power set the fire. Power denied setting the fire, and the district court could not have been required to conduct a "mini-trial" to see if he were telling the truth, Fed. R. Evid. 608 (b).[6] Even if the court had conducted such a mini-trial, such a procedure could not have helped appellant. To the extent that Power's testimony could be discredited by demonstrations of prior bad acts, his admission to numerous other crimes and bad acts would have more than adequately sufficed. Our judgment in this respect finds support in the fact that defense counsel, armed with the

---

[5] Appellant McNiff suggests two other manners in which the evidence would have impeached Power's testimony: (1) proof that Power set the fire would have shown that he was "agitated" in the aftermath of the fire and thus unable to recall accurately the conversations that he had with McNiff at that time; and (2) proof that he set the fire would have shown the jury that Power was lying to them on that point and thus untrustworthy. The first point we find almost frivolous on its face, and in any event see no possibility that such a line of argument could have affected the judgment of the jury. The second point is factually more plausible; yet legally unsound in that acceptance of such reasoning would mandate mini-trials on collateral issues, contrary to Rule 608 (b).

[6] The district court indicated that it would not have conducted such a hearing.

knowledge that at least two individuals accused Power of setting the fire, chose not to pursue the matter any further than they did.

VI. "Willful Blindness" Instruction

The trial judge instructed the jury in part on the issue of intent and state of mind as follows:

> " 'Knowledge' and 'willfulness' are mental conditions or a state of mind. Normally we cannot prove a state of mind for the obvious reasons that no witness is able to look inside a person's mind and find out or testify as to what he saw there. So you must judge a person's intent by what a person does or says or fails to do or fails to say.
>
> What a man does is frequently more indicative of his true state of mind than what he says.
>
> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to you. You may infer knowledge if you find beyond a reasonable doubt that the witness refused to be enlightened, refused to take notice.
>
> Stated another way, a defendant's knowledge may be inferred from a willful blindness to the existence of the fact. It is entirely up to you as to whether you find any deliberate closing of the eyes and the inference to be drawn from any such evidence.
>
> Any such evidence showing negligence or mistake is not enough to support a finding of willfulness or knowledge."

Appellants Gintner, Bancroft, and Ciampaglia objected to this charge, arguing that it "deprived the jury of its decision as to whether actions are more indicative of one's state of mind" and "shifted the burden to the defendants to disprove their actions."[7] They now argue that the instruction constitutes reversible error. We disagree.

---

[7] The court in response to the objection gave a new instruction. In doing so, however, as appellant points out, the court merely paraphrased in less precise terms its first version.

The district court never instructed the jury that it had to draw an inference of intent from defendant's actions. Taken alone, the second paragraph of the instruction could possibly have been misread by a juror as mandating such an inference. Taken as a whole, however, *see Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973), the instructions on knowledge could not have been so read by a reasonable juror, *compare Sandstrom* v. *Montana*, 442 U.S. 510. The trial judge repeatedly used the word "may" throughout the instruction, and explicitly stressed that the decision as to whether any inferences should be drawn "is entirely up to" the jury. The trial judge also instructed the jurors that the prosecution must prove "each and every element of the case or the charge beyond a reasonable doubt" and that the burden of proof "is always on the government" and "never shifts".

Appellants also contend that even if the instruction did not shift the burden of proof on any elements of the crimes charged, it was improper and prejudicial to give the "willful blindness" instruction in this particular case because "[t]here were no facts produced at trial which indicated that any of the defendants deliberately avoided knowledge of the scheme to defraud the creditors of Masterson." *See United States* v. *Murrietta-Bejarano*, 552 F.2d 1323 (9th Cir. 1977).

The facts, however, at least as portrayed by appellants, were sufficient to justify the giving of this admittedly unusual charge. Appellant Gintner worked for Masterson on at least 30 occasions, filling out forms and answering the phone using false names and compiling fraudulent credit references. Appellant Bancroft worked at Masterson on a daily basis, also used a false name, and was observed removing records that were subsequently never found. He was also seen cutting Masterson labels off merchandise on the day that the search warrants were executed. Appellant Ciampaglia operated a company that served as the conduit for receiving and responding to requests for credit references. He dealt extensively with

Masterson, purchasing large amounts of its merchandise at 40% of the wholesale price on a cash only basis. He was also seen attempting to disguise Masterson papers and merchandise by removing labels. All three individuals have defended themselves throughout by asserting that they were simply associated with Masterson and did not realize that they were assisting in the fraudulent schemes. The jury could have believed this assertion. However, it could also have thought that the facts indicated a pattern of behavior predicated upon a knowledge of the conspiracy together with a desire to limit inculpatory evidence of complicity, yet nevertheless participate in the scheme. Therefore, the giving of the "willful blindness" instruction in this particular case was not error.

VII. Evidentiary Use of Bankruptcy Proofs of Claim

The prosecution introduced into evidence 700 proofs of claim, totaling 1.2 million dollars, that were filed against Masterson in bankruptcy court one-half year after the "business" commenced operation. The purpose of this evidence was to raise an inference that Masterson was run in a highly unusual manner and not as a normal, legitimate enterprise. Appellants objected, asserting that the evidence was hearsay. This assertion would have been correct if the evidence had been introduced to prove how much Masterson actually owed its creditors (thereby raising the inference that it was not conducting business in good faith). However, as the district court correctly recognized, the proofs of claim were not hearsay for the purpose of establishing the fact the 700 claims totaling 1.2 million dollars were filed against Masterson within a half year after it commenced operations. This fact — the filing of an inordinate number and amount of claims in such a short time — also raised at least an inference that Masterson was not a typical, good faith business operation.[8]

[8] As the statement of facts set forth in this opinion demonstrates, the proofs of claims were not the only evidence that raised such an inference.

That the proper use of this evidence resulted in raising essentially the same inference that its improper use would have raised is by no means a sufficient reason to bar its admission.

VIII. Denial of Severance Motion

Appellant Ciampaglia, who was not charged with conspiracy to conceal the property of the bankrupt (Count 2), asserts as error the trial court's denial of his motion for severance. We find no merit whatever to this assertion. Denial of Rule 14 motions will be reversed only upon a showing of abuse of discretion, *Sagansky* v. *United States*, 358 F.2d 195, 199-200 (1st Cir.), *cert. denied* 385 U.S. 816 (1966). Where all of the counts tried together are directly related to and part of the same overall scheme and transaction, and where separate trials would have necessarily involved repetitive use of most of the same evidence and same facts, we find no possibility of such an abuse absent a clear showing of substantial prejudice to the defendant. Given appellant Ciampaglia's involvement in the overall conspiracy, *see* Part VI, *supra*, and the fact that the evidence admitted against the other defendants which he claims prejudiced him was for the most part admissible against him under *Petrozziello*, *supra* Part II, (and was othewise the object of limiting instructions), we are not at all inclined to find that the trial court even approached an abuse of discretion.

* * *

In conclusion, we find that the trial resulting in appellants' convictions was conducted fairly.[9]

The judgments of the district court are affirmed.

---

[9] Appellant Woods has filed an eight page "Supplementary Brief" in which he raises *pro se* several points not argued by his counsel. We have examined these points and find them devoid of merit.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 79-1269.

UNITED STATES OF AMERICA,
APPELLEE,

v.

PAUL CIAMPAGLIA,
DEFENDANT, APPELLANT.

JUDGMENT
Entered: August 4, 1980

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Natola and Kelly]